Federal Court  Cour fédérale

Date: 20200226

Docket: IMM-4524-19

Citation: 2020 FC 306

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ZURAB CHIKADZE
(AKA ZURAN CHIKADZE)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicant's appeal and confirmed a decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant is a citizen of Georgia. He alleges he fears persecution in Georgia due to his membership and political activities on the behalf of United National Movement [UNM] which is a political group opposed to the government of Georgia, and because of his ethnicity as a member of the Ossetian ethnic minority.

[3] In the Applicant's Basis of Claim [BOC] narrative, he outlines discrimination he allegedly faced due to his Ossetian identity and his involvement in the UNM. In 2002, he was dismissed from his role as a school teacher on the sole basis that he was Ossetian. In 2004, he married a Georgian woman whose family did not approve of the Applicant because of his Ossetian ethnicity. In 2011, as a result of a fight with a member of his wife's family he suffered injuries and was taken to the hospital. In October, 2014, the Applicant and his wife divorced. In December, 2014 he lost his job as a wholesale manager because he was Ossetian and a UNM member. He began a job as a taxi-driver and web-based salesperson.

[4] In April, 2016, at a youth event in support of UNM, the Applicant was approached by five or six members of the Georgian Dream, an opposing political party. The Georgian Dream members told him that as an Ossetian he had no business being involved in Georgian politics and he should not return. Later that same month, he was attacked by Georgian Dream party members at a protest meeting organized by UNM and was hospitalized as a result. At the hospital, the police reportedly told him that as an Ossetian, Georgian politics were not his concern.

[5] In September, 2016, he alleges he was attacked by five people outside his home following another youth event he conducted on behalf of UNM. In October, 2016, the Applicant

received a threatening phone call warning him not to vote in the elections or his throat would be cut “and there would be one less Ossetian and UNM member in Georgia”.

[6] In January, 2017, he allegedly received another threatening phone call warning him against attending a UNM convention. Later that month, he was attacked again and was hospitalized as a result. Some of the attackers were from a previous attack. He received no assistance from the police.

[7] Shortly after the attack in January, 2017, the Applicant hired an agent to obtain a Canadian visa. In March, 2017, he moved from Tbilisi to a friend’s home in Adjara to await his visa. His visitor visa application was rejected.

[8] On or about September 14, 2017, the Applicant left Georgia on a counterfeit Slovakian passport. His passport was identified as fraudulent in Portugal and he was detained there for one day and then released; importantly he was not deported to Georgia. He then used a counterfeit Estonian passport to travel to several countries including Germany, Portugal, Hungary, Slovakia, the Czech Republic, France and Algeria.

[9] In October, 2017, the Applicant arrived in Canada from Algeria and made a refugee claim at the airport on arrival.

[10] An interpreter was provided for him, however the interpreter was on a telephone line and not in the interview room.

[11] The Applicant completed a number of POE forms at the airport, including “Schedule A” in which he was asked to provide his work history and where he lived.

[12] The Applicant omitted from the Schedule A form that he had been in hiding and unemployed in the Adjara region of Georgia from March, 2017 to September, 2017. At the RPD hearing, he provided testimony that he thought he only needed to provide his registered addresses, which is what he did.

[13] Prior to the hearing before the RPD, the Applicant and his counsel noted that Schedule A was filled out in error in terms of when he was in hiding, and had one or two other inaccuracies. He submitted a detailed BOC form with which he included what he thought was an amendment in the form of an affidavit setting out that he had lived in Adjara.

[14] His claim was heard by the RPD in December, 2017. The RPD rejected the claim in January, 2018, based on a finding that he lacked credibility. The RPD refused to accept the affidavit filed by the Applicant with his BOC to amend Schedule A, on the basis that Schedule A was a form filed by the Minister which could not be amended by affidavit submitted for the Applicant.

[15] The Applicant appealed the RPD’s decision to the RAD, which dismissed the appeal and confirmed the RPD’s decision in a decision dated June 27, 2019 [Decision]. The determinative issues were credibility and whether there was a possibility of persecution or a likelihood of other harm to someone of Ossetian ethnicity living in Georgia.

[16] On the issue of credibility, the RAD concluded:

> [68] It falls to me to make an overall conclusion regarding the Appellant's general credibility, and in particular whether he has shown that he faces a serious possibility of persecution or, on a balance of probabilities, a threat of other harm as outlined in subsection 97(1) of the IRPA upon return to Georgia. When I balance the Appellant's credibility problems as discussed above against his supporting documents, l find on a balance of probabilities, that the Appellant lacks overall credibility. I find that while he was a member of the UNM, he was not sufficiently involved with that party that his safety would be in jeopardy upon his return to Georgia or that anyone would have the desire to seek him out based on his political activities. I find further that, although the Appellant is of Ossetian ethnicity he has not been persecuted or otherwise harmed in Georgia on this basis.

[17] It is common ground the standard of review in this case is reasonableness, which I accept. Reasonableness requires the reviewing court to pay respectful attention to the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner, at para 84 [*Vavilov*]. In assessing reasonableness the Court must look at the reasoning process in terms of coherent and rational chain of analysis, and the outcome of the reasoning in terms of the legal and factual constraints facing the decision-maker: *Vavilov* at paras 83-86. The decision under review must be justified, intelligible and transparent: *Vavilov* at para 99. Judicial review is not a treasure hunt for errors: *Vavilov* at para 102.

[18] The Applicant submits a number of issues for determination, however I will only deal with those discussed below which in my view are determinative.

[19] First, the address issue. The Schedule A POE document indicates the Applicant was living in Tbilisi in Georgia until October, 2017. That was not the case. His BOC and oral testimony was that he was in hiding in Adjara from March to September, 2017. When asked for

an explanation why this was not indicated in Schedule A, he said he thought when asked where he lived, he was meant to give registered addresses. His address in Adjara was not his registered address. He gave his registered address in Tbilisi. The RAD found his credibility was negatively affected in terms of not disclosing his having lived in hiding in Adjara from March to September, 2017. It found he had not lived in hiding in Adjara, because of the inconsistency of that information with the information provided in the POE documents.

[20] The RAD did not accept the Applicant's explanation for the inconsistency, saying "nothing in the wording of the question supports such an interpretation." With respect, the RAD in so finding failed to deal with the fact the Applicant had tried to correct Schedule A by filing an affidavit with and at the time he filed his BOC. If the affidavit had been converted into a schedule to his BOC, it would have been accepted as evidence. Instead it was rejected by both the RPD and the RAD. This seems to me to be an unreasonable triumph of form over substance.

[21] In this connection, it is also well settled that refugee decision-makers should be cautious before faulting a claimant on the bases of inconsistencies, omissions, or details between a POE signed at the airport on arrival in Canada and later submissions such as oral testimony or, as in this case, a BOC. See Justice Kane's decision in *Guven v Canada (Citizenship and Immigration)*, 2018 FC 38 at paras 39-42:

> [39] With respect to making credibility findings based on the POE forms and notes, the jurisprudence cautions against relying on inconsistencies in testimony between the POE notes and later testimony and documents, unless those inconsistencies are about "crucial elements" of the applicants claim.
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> [40] In *Wu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1102, [2010] FCJ No 1388 [*Wu*], Justice O'Reilly noted that there were many credibility concerns with the claimant's

evidence, including contradictions in the claimant's account regarding the passport he used, the route he took to travel to Canada, and his admission that he had attempted to mislead the POE officer. Despite these well-founded concerns, Justice O'Reilly also considered the nature of information collected at the POE stage, and noted that decision-makers should refrain from placing "undue reliance" on inconsistencies… arising from the POE evidence, at para 16:

> [16] With respect to the Board's reliance on differences between Mr. Wu's statements at the POE and his testimony at the hearing, I accept that the Board should be careful not to place undue reliance on the POE statements. The circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise. Here, Mr. Wu submits that he did not understand the interpreter at various points and that this explains the differences between his POE statements and his testimony before the Board.

[41] Similarly, in *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8, 403 FTR 46 [*Cetinkaya*], Justice Russell cautioned against reliance on the POE notes to make credibility findings, stating at para 51:

> It is an error of the RPD to impugn the credibility of the Applicant on the sole ground that the information provided by the Applicant at the POE interview lacks details. The purpose of the POE interview is to assess whether an individual is eligible and/or admissible to initiate a refugee claim. It is not a part of the claim itself and, consequently, it should not be expected to contain all of the details of the claim (see also *Hamdar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 382 at paragraphs 43 through 48, and *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at paragraph 25) (emphasis added). Other cases have held that inconsistencies between POE statements and later evidence can ground credibility findings only where they are "major" and go to "crucial elements of a claim" (*Chen v. Canada (Minister of Citizenship and Immigration*), 2005 FC 767 at para 12, [2005] FCJ No 959, and *Jamil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para

> 25, 295 FTR 149). The facts in each case will differ, but the principle remains that the decision-maker exercise caution in making credibility findings based on inconsistencies or omissions arising from the POE statements alone. The POE is not part of a refugee claim, and should not be expected to contain all the details of the claim. The purpose of the form is to establish whether an individual is eligible to make a refugee claim. Moreover, the circumstances surrounding the taking of those statements "is far from ideal and questions about their reliability will often arise" (*Wu* at para 16).
>
> [42] To summarize, the jurisprudence cautions against reliance on POE notes with respect to omissions and lack of detail as the sole basis for negative credibility findings. When an applicant swears the truth of certain allegations, there is a presumption that those allegations are true, unless there is a reason to doubt their truthfulness (*Maldonado* at para 5 (CA)). If there is a valid reason to doubt an applicant's credibility, decision-makers can seek corroborating evidence, and can draw a negative inference from the lack of corroboration. However, an applicant's explanation for failing to provide corroborating evidence must first be considered before such inferences can be drawn (*Dundar, Ismaili* at para 36; *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10, [2004] FCJ No 62 (QL)).

[22] I am not satisfied the RAD considered this jurisprudence, which constrains refugee decision-makers.

[23] The RAD dealt with this in part as follows; however, this finding must be read in light of the fact the Applicant did not have an interpreter present when he signed the POE. The RAD stated:

> [26] The RPD is correct that the information the Appellant declared to be "truthful, complete and correct" in this Schedule A Form docs not correspond with his testimony or his BOC narrative. He states that he lived in Tbilisi from September 2004 to October 2017 and that he worked as a taxi driver in Tbilisi from January 2015 until October 2017. (As noted, the Appellant left Georgia on

> September 14, 2017.) The Appellant provided the following explanation tor the discrepancy:
>
> > When they asked me the question I gave the address that I registered so the Adhara region where I lived it was just like I was hiding there and I couldn't give the address that doesn't belong to me and it was like the most terrible month because I was almost always at home and l just gave the address that I was registered [at].
>
> [27] I do not accept the Appellant's explanations. The idea that the Appellant thought the question "List all addresses where you have lived since your 18th birthday or the past 10 years…" referred only to "registered" addresses or addresses of properties belonging to him is unreasonable. Nothing in the wording of the question supports such an interpretation. Nor can I see how his having "a terrible month" in Adjara would lead to the inconsistency.
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> [Footnotes omitted]

[24] The Applicant also submits, and I agree, the RAD failed to consider that refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. He submits that while Canadians do not have "registered" addresses, Georgians must. The Applicant relies on *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, per Muldoon J at para 7 [*Valtchev*]:

> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman,

> *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]
>
> [Emphasis added]

[25] Second, the RAD assessed the Applicant's credibility negatively on the basis of his answers to certain questions about his political party, namely the UNM. In particular, he had no knowledge of two legal decisions which the RAD considered important and would have been known to an active supporter of UNM, which the Applicant claimed to be. In my respectful view, this assessment was somewhat arbitrary and I am not satisfied that all or even most active supporters of the UNM would know the answers.

[26] Third, the RAD found the Applicant's credibility was negatively affected because after he was arrested in Portugal for travelling on a false passport, and was released, he continued to travel in Portugal but on another fake passport. The RAD said this meant he assumed additional risk of being returned to Georgia, which undermined his claim to subjective fear of persecution. With respect, this finding is not grounded on the record because he was not returned to Georgia when arrested with the fake passport; he was released. The required rational chain of analysis is weakened.

[27] I also note the RAD - unlike the RPD - accepted as authentic a medical report showing the Applicant had been beaten. The Applicant gave considerable evidence of attacks on him by members of the UNM. The medical report could tend to confirm at least one of the assaults. So could his membership in the UNM, as well as his being an Ossetian. While the RAD found the Applicant not credible, the RAD made no finding with respect to the alleged assaults. In my

respectful view, there is a lack of resolution to this aspect of the claim. There is a requirement that credibility findings should only be made in the clearest of cases: *Valtchev* at para 7.

[28] Given the above, the Court concludes the reasons of the RAD does not demonstrate a complete internal coherent and rational chain of analysis as required. In some respects the Decision is not justified in relation to the facts and law that constrain the decision-maker. Considering the Decision holistically and not as a treasure hunt for errors, and paying ‘respectful attention’ to the reasoning process and its outcome, I have come to the conclusion that judicial review should be granted.

[29] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4524-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted RAD, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4524-19
STYLE OF CAUSE:	ZURAB CHIKADZE (AKA ZURAN CHIKADZE) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2020
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 26, 2020

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